

**Before the
Federal Communications Commission**

In the Matter of a)	
)	
Request for a Determination Filed by)	
Hand Held Products, Inc.)	
)	Docket WT 01-309
In Regard to Hearing Aid Compatibility)	
)	
)	

Comments of the American Association of People with Disabilities

The American Association of People with Disabilities (AAPD)¹ is pleased at the opportunity to provide comments in regard to the Public Notice (DA 07-103) released January 18, 2007 by the Federal Communication Commission (FCC) Wireless Bureau in response to a request filed by Hand Held Products in the Hearing Aid Compatibility Docket. AAPD advocates for accessibility and usability of all telecommunications devices so that persons with disabilities are not left out, left behind or otherwise excluded by technological barriers in products and services commonly used in everyday life.²

AAPD asserts that Hand Held offers little to support a waiver of the requirement to have its product hearing aid compatible and furthermore, we believe Hand Held is not in compliance with Section 255 of the Communications Act.

I. Little Evidence to Support a Waiver of Hearing Aid Compatibility

¹AAPD is the largest national nonprofit cross-disability member organization in the United States, dedicated to ensuring economic self-sufficiency and political empowerment for the more than 51 million Americans with disabilities. AAPD works in coalition with other disability organizations for the full implementation and enforcement of disability nondiscrimination laws, particularly the Americans with Disabilities Act (ADA) of 1990 and the Rehabilitation Act of 1973, and other statutory mandates for persons with disabilities.

² Specifically, the Board of Directors of AAPD passed June 14, 2006, a policy resolution as follows: Given that telecommunications and technology are fields that are rapidly changing, and this will impact the integration of persons with disabilities in all aspects of daily living, be it resolved that: with regard to telecommunications equipment and services, accessibility and usability are critical, and affordability is essential, for the full inclusion of persons with disabilities; and with regard to technology, barriers to usability and availability should be removed; all technologies should incorporate the concepts of accessibility and usability in design, development, production and dissemination, with the intention of making new technologies available to all persons regardless of disability.

In its request, Hand Held discusses its “Dolphin” trademarked line of products that “... comprises several families of devices that provide real-time information access, data transmission, and containing [sic] additional telecommunications capabilities. Each mobile computer is customized to meet the business requirements and applications of Hand Held Products’ specific customers.”³ Hand Held states that it seeks a determination that the Commission’s hearing aid compatibility (HAC) rules are inapplicable to its mobile computing devices and would not frustrate access to telecommunications equipment by the hard-of-hearing. Hand Held states that its devices are “business tools” for industrial, commercial and government uses, not consumer products produced for the mass market.

AAPD asserts that “business tools” should be hearing aid compatible for the following reasons:

(a) Business purchasers may encounter risk

While AAPD acknowledges Hand Held’s point that its Dolphin line of products is primarily bought and used by commercial enterprises as “business tools” we note that employees of the enterprises that might purchase such business tools may be persons with hearing disabilities who would need hearing aid compatibility in order to execute the essential functions of their job. We note, specifically, that under Title I of the Americans with Disabilities Act (ADA),⁴ employers cannot discriminate on the basis of disability, including persons with hearing disabilities – such as users of hearing aids -- and the availability of “business tools” that are accessible to and usable their employees with disabilities is very important. This may include employees with hearing disabilities who use hearing aids and who would need “business tools” that their colleagues without hearing aids would also be using in order to perform the essential functions of their jobs.

Title I of the ADA applies to State and Local Governments, Legislative and Judicial Branches of the Federal Government, Private Employers,

³ Hand Held Request at 3.

⁴ Title I requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship. Religious entities with 15 or more employees are covered under title I. Business must provide reasonable accommodations to protect the rights of individuals with disabilities in all aspects of employment. Possible changes may include restructuring jobs, altering the layout of workstations, or modifying equipment.

Employment Agencies, and Labor Unions. We believe it entirely possible that Hand Held may already be selling or intends to sell this line of products to these types of employers. We believe therefore it is not in the public interest for this line of products to be exempted from the requirements for Hearing Aid Compatibility as it would put such employers in the prejudicial position of selecting employees without hearing aids for positions where this business tool is used.⁵ AAPD notes that this employer behavior could subject them to charges of discrimination under the ADA. Hand Held should not be making products that may perpetuate acts of discrimination either directly or indirectly.

(b) Presence of other features do not support HAC exemption

Because of the size of the device, Hand Held states it is more likely to be used in speakerphone or headset mode than as a handset and therefore, it “can be used to the same level of effectiveness by hard of hearing individuals”⁶ even without hearing aid compatibility compliance.

AAPD is puzzled by this assertion. It appears that Hand Held is stating that speakerphone or headset mode of the handset is a substitute for ensuring the device is hearing aid compatible. While it may be true that for some users of hearing aids, or for some persons with some loss of hearing capability, having the device in speakerphone or headset mode makes the device usable and accessible to them, it appears that Hand Held has not conducted any evaluation or testing to establish that its product does not interfere with hearing aids.

(c) Size of device does not support HAC exemption

Hand Held also argues that, although the devices are technically capable of use in handset mode, this will rarely occur because usage in this manner is similar to “putting a brick next to one’s head.”

AAPD is quite puzzled by Hand Held’s argument here. They seem to be saying that even though the device is capable of being used in handset mode, it won’t be used this way as the device is “like a brick.” AAPD wonders why then they are even making this feature available if usage “will rarely occur.” There are employees of these purchasers of this device who may or

⁵ Hand Held’s request includes mention, in paragraph 2, that its products are intended for applications “such as warehousing, transportation, inventory, checkout and package delivery.” AAPD sees no reason why there would not be employees who use hearing aids in these positions involving these applications and is at a loss to explain why Hand Held cannot imagine employees with hearing aids in these types of employment.

⁶ Page 8, Letter from Smith and Mendelsohn, Counsel for Hand Held Products, to FCC Secretary, filed April 28, 2006 (“Letter from Smith and Mendelsohn”).

may not use hearing aids and who may or may not put the device to their ear to use it. Hand Held offers no documentation to support their intimation that users with hearing aids would or would not put the device against their ear as compared to users without hearing aids. AAPD notes that the initial wireless voice telephony products in the marketplace were compared in size to “bricks” and yet users found them useful; likewise there are numerous cordless phones – and some are hearing aid compatible! -- that are almost as big as bricks and consumers still purchase them.

(d) Marketplace Needs HAC Products

AAPD asserts again that there will be purchasers of the product who are businesses and they will want to be sure they are not in jeopardy of discrimination suits under the ADA in the event they have an employee with a hearing disability who uses a hearing aid, that is, they may hire an employee who uses a hearing aid or an employee becomes a user of a hearing aid while on the job.

AAPD reminds the FCC that persons with hearing and other disabilities are among the most underemployed and unemployed in the United States, with rates of unemployment ranging from 53-75% depending on the severity of disability. Specifically, in 2005, the year with the most recent census figures, the overall employment rate of working age (21-64) people with disabilities was 38.1 percent in the U.S.⁷ Furthermore, the group of working age persons in the U.S. with “Sensory Disabilities,” defined as a persons with a long-lasting condition such as “blindness, deafness, or a severe vision or hearing disability,” is at least 5 million persons.⁸

For New York state, Handheld’s home state, the employment rate of working age people with disabilities was 35.7 percent,⁹ an indication of slightly more unemployment for working age persons in New York state than generally across the U.S. AAPD notes, too that in New York state, the group of persons with “Sensory Disabilities,” defined as a persons with a long-lasting condition such as “blindness, deafness, or a severe vision or hearing disability” the level of employment is 45.8 percent.¹⁰

⁷Page 5, 2005 Disability Status Reports for United States. Rehabilitation Research and Training Center on Disability Demographics and Statistics (2005). 2005 Disability Status Reports. Ithaca, NY: Cornell University. See at <http://www.ilr.cornell.edu/edi/disabilitystatistics/>, last accessed February 22, 2007.

⁸ Ibid.

⁹ Page 5, Disability Status Reports New York. Op. cit. (supra).

¹⁰ Ibid.

We note also that around 10 per cent of the world's population, or 650 million people, live with a disability and are the world's largest minority. According to 2005 estimates by the World Health Organization (WHO), 278 million people worldwide have moderate to profound hearing loss in both ears.

Furthermore, as the population ages, there will be an increase in the need for all HAC products, whether they are sold for business use or not.

We assert, therefore, that to put out in the local, national or global marketplace, a telecommunication product that is not hearing aid compatible is another way to perpetuate the continued underemployment and unemployment of persons with hearing disabilities.

(f) Cost of Compliance with HAC requirements

Finally, Hand Held also argues that the cost of hearing aid compatibility compliance (which it estimates would add approximately \$150 to the current retail price of its devices, amounting to about 6 % to 9 % of additional cost for one of its devices) will render its products uncompetitive. AAPD sees no documentation to support this cost contention and would expect to see some detailed documentation to support this assertion, including product evaluation and testing materials.

II. Dolphin Products Do Not Appear to Meet Statutory Requirements under Section 255 of the Communications Act

AAPD believes that these devices may not be in compliance with the regulatory requirements under Section 255 of the Communications Act. Specifically, manufacturers of telecommunications equipment must ensure that the equipment is designed, developed and fabricated so that the telecommunications functions of the equipment are accessible to and usable by individuals with disabilities, if readily achievable.¹³

Additionally, whenever the requirement of this regulatory obligation is not readily achievable, the manufacturer must ensure that the equipment is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to

¹¹“Some Facts about Persons with Disabilities,” Convention on the Rights of Persons with Disabilities, United Nations, Department of Public Information, 2006, New York. See at <http://www.un.org/disabilities/convention/facts.shtml>, last accessed February 22, 2007.

¹² “Deafness and hearing impairment,” Fact Sheet, World Health Organization. See at <http://www.who.int/mediacentre/factsheets/fs300/en/index.html>, last accessed February 22, 2007.

¹³ Requirement at 47 CFR Part 6.5(a)(1).

achieve access, if readily achievable.¹⁴ For example, would it work with a TTY or a telebraille-type device? Can a person with a hearing disability who uses a cochlear implant use the device?

(a) No evidence of design, development and fabrication pursuant to Section 255

Handheld's Exhibit 1 includes two Product information sheets, neither of which include or describe any accessibility or usability features, or that would indicate the company has designed, developed and evaluated the product in conformity with the federal requirement that it must evaluate the accessibility, usability and compatibility of equipment and that it must incorporate such evaluation throughout product design, development and fabrication as early and consistently as possible. There is no indication that this manufacturer has identified barriers to accessibility and usability for persons with disabilities as part of a product design and development process.¹⁵

(b) Attempt to Diminish Voice Capability of Device is Spurious

Hand Held makes light of the mobile voice capacity on the device through two assertions: "10% of Hand Held Product's customers use the GSM features available on the mobile computers, ... the sole customer ... that utilizes voice applications is German Railways, located in Germany;"¹⁶ and "One estimate is that less than 15% of all installed GSM enabled Dolphins currently utilize voice communication over the GSM link."¹⁷ Hand Held does not provide information about the number of customers, so there is no way to know what 10% is and how many customers there are with these products that are out of compliance with federal regulations.

Even via a cursory Internet search, AAPD notes that the German Railway system is nearly twice the size of the British railroad system, with 22,350 route miles, running 1,000 long distance trains per day, 29,000 regional trains and 7,000 daily freight trains.¹⁸ Despite being the sole customer of the GSM enabled Dolphin, the number of employees using the device is likely to exceed thousands of persons. Whether or not these employees have disabilities, and specifically whether or not any of them would be able to do their job better if the device were hearing aid compatible

¹⁴ 47 CFR Part 6.5(a)(2).

¹⁵ Requirement at 47 CFR Part 6.7.

¹⁶ Page 4, Letter from Smith and Mendelson.

¹⁷ Page 5, Letter from Smith and Mendelson.

¹⁸ See in "Battle over national rail card in Germany," April 2003, see at <http://www.railwatch.org.uk/backtrack/rw095/rw095p08.pdf>, last accessed February 22, 2007.

or otherwise more accessible to and usable by persons with other types of disabilities, is unknown. A similar sale to Amtrak, here in the U.S., for instance, could put Amtrak at risk of ignoring the needs of its hearing disabled employees and employees with other disabilities.

Nevertheless, on the basis of such “low usage of voice communication on the GSM,” Hand Held then asserts “As there is no voice communication, it is believed that a user with a hearing aid would not have any disadvantage with respect to a user with normal (sic) hearing capabilities.”¹⁹

AAPD does not understand how “15% of GSM enabled Dolphins utilizing voice communication over the GSM link” and “one sole user, German Railways,” becomes “no voice communication.” We believe that Hand Held is admitting in this “estimate” that it does not know whether there are users of its product with hearing aids or with cochlear implants, or with other disabilities, and it has likely never evaluated this type of accessibility, or any other type of accessibility, usability and compatibility and is therefore not in compliance pursuant to the regulations for Section 255 of the Communications Act.

(c) Ancillary nature of telecommunications does not support lack of compliance

Hand Held argues that “Voice applications ... are ancillary to the main functions of the mobile computers... [and they] are not designed to replace or replicate the functions of commonly available cells phones.”²⁰ One suggestion by Hand Held – presumably to support the lack of compliance with hearing aid compatibility and Section 255 requirements -- is to limit the voice applications by restricting dialing to emergency and intra-corporate numbers.²¹ AAPD does not understand this point; does Hand Held think employees with hearing aids don’t know how to dial emergency numbers or would not do so? Does Hand Held think employees with hearing aids or with cochlear implants do not want to talk to other employees by dialing intra-corporate numbers? We see an assumption underlying this suggestion and believe it is a manifestation of discrimination, that is, hard-of-hearing employees are assumed to not be in the workplace, nor assumed to work in the same ways others do.

¹⁹ Page 6, Letter from Smith and Mendelson.

²⁰ Page 6, Letter from Smith and Mendelson.

²¹ Page 6, Letter from Smith and Mendelson.

AAPD further notes that Hand Held has not filed the required notification to the Commission of a point of contact as required pursuant to Section 255 of the Act.²²

Lastly, AAPD is concerned with the date of release of this Public Notice, which was January 18, 2007, which is almost ten months after receipt of Hand Held's request by the Federal Communications Commission (FCC) on April 28, 2006. We believe that this Public Notice should have been released sooner to allow the opportunity for public comment to occur. Due to the FCC's delay, this company, via its distributors, has now had over nine months in which to manufacture and sell devices that are likely not in compliance with federal regulations for hearing aid compatibility or in accordance with requirements under Section 255 of the Act. We are disturbed by this lack of timeliness by the FCC and believe there should be no delay in a final determination by the agency that the optionally available mobile telephone capabilities should be compliant with longstanding regulatory mandates and that the Commission should not waive the rules under the circumstances of the case.

AAPD appreciates this opportunity to comment on the request for a determination by the Wireless Bureau of the Federal Communications Commission. We ask for a determination that respects and requires the accessibility and usability mandates outlined above and that provides no waiver or exemption from the requirements for hearing aid compatibility and for accessibility and usability in design, development and fabrication as required under Section 255 of the Act.

Sincerely,

Jenifer Simpson

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²² Requirement at 47 CFR, Part 6.18